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July 3, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Applications for Transfer of Control of Hispanic Broadcasting Corp., and Certain Subsidiaries, Licensees of KGBT (AM, Harlingen, Texas *et al.* (Docket No. MB 02-235, FCC File Nos. BTC-20020723ABL, *et al.*)

Dear Ms. Dortch:

Spanish Broadcasting System, Inc. ("SBS") recently submitted to the Commission two analyses that demonstrate (1) that millions of Americans uniquely rely upon Spanish-language broadcasting for their news and information,¹ and (2) the Commission has repeatedly (and for more than three decades) recognized that foreign-language broadcasting, and particularly Spanish-language broadcasting, serves a distinct audience.² Given these facts, the Commission must consider the effects of the proposed Univision-HBC merger on diversity and competition in local markets for Spanish-language broadcasting, including both radio and television in the same market, as has been the Commission's practice for more than three decades, and as the Commission's most recent broadcast ownership regulations continue to recognize for diversity purposes.³

¹ See Letter from Philip L. Verveer, *et al.*, Counsel to Spanish Broadcasting System, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket 02-235, at 2-3 (June 20, 2003) ("SBS June 20 Letter") (Approximately 38% of Hispanic Americans rely predominantly on Spanish-language news programs, and 25% (9.7 million people) rely exclusively on Spanish-language news programs.).

² See generally Letter from Philip L. Verveer, *et al.*, Counsel to Spanish Broadcasting System, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket 02-235 (June 26, 2003).

³ The Commission's decision in the media ownership rulemaking was released on July 2, 2003, and counsel to SBS are still in the process of reviewing the decision and related material. Thus, characterizations herein of the new rules primarily reflect examination of

When the top ten Spanish-language broadcast markets (by Hispanic population) are analyzed, the following conclusions are apparent: (1) the merger would result in extremely concentrated Spanish-language broadcast (advertising) markets;⁴ and (2) the merger would dramatically reduce diversity in Spanish-language broadcast markets.⁵ The extent of the harm to competition and diversity in these markets can be further understood by analyzing the proposed merger under the recently-adopted multiple ownership rules as applied to Spanish-language broadcast markets separate from majority-language markets.⁶ The analysis shows Spanish-language broadcast markets are extremely “thin,” so much so that the transaction fails to pass muster under the Commission’s rules. Indeed, an examination of the Spanish-language markets today shows that they are much more fragile than the “general” broadcast markets when the radio/television cross-ownership rule was first “relaxed” in 1989 to allow for waivers in the largest markets. This indicates that the recently-adopted media ownership rules for the general market, even if applied to Spanish-language broadcasting as a separate market, would allow far too much concentration in the more fragile Spanish-language markets. Thus, a review of competition and diversity specific to Spanish-language broadcasting is plainly required for this proposed merger.

Radio/Television Cross-Ownership Regulation.

From its inception, the FCC’s radio/television cross-ownership rule has been founded on the bedrock goals of promoting diversity and competition. The concept that limiting radio and television cross-ownership would promote those goals depends on the insight that radio and television stations participate in the same “market” for the purpose of diversity and competition. As explained below, this insight continues with the same force today, particularly in markets like the Spanish-language broadcasting market.

In its 1999 affirmation of the importance of diversity in local broadcast markets, the FCC noted that “[m]onopolization of the means of mass communication in a locality assure the monopolist control of information received by the public and based upon which it makes

the summary released on June 2. SBS presently plans to submit a more comprehensive filing as to the import of the new rules for this proceeding in the near future.

⁴ See generally Letter from Philip L. Verveer, *et al.*, Counsel to Spanish Broadcasting System, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket 02-235 (June 11, 2003).

⁵ See SBS June 20 Letter at 3, n.9, attachment.

⁶ As described below, there are good reasons why more restrictive ownership rules would be justified for Spanish-language broadcasting (*e.g.*, the “thinness” of Spanish-language broadcast markets and the fact that the recently-adopted rules are premised on the absence of economic competition between radio and television stations).

elective, economic and other choices.”⁷ Thus, the “wellspring” of the radio/television cross-ownership rule is the principle that “basic to our form of government is the belief that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’”⁸ And, while the FCC’s confidence that radio and television compete in the same economic (advertising) market has waned over time, even after the recent elimination of the cross-ownership rule for larger markets, the Commission continues to regulate ownership based upon the principle that radio and television compete.

In 1970, when the Commission adopted the radio/television cross-ownership rule, it acted principally out of a desire to “promote diversity of viewpoints in the same area.”⁹ The Commission opined that “[i]nsofar as there is overlap of audiences of the three services [AM, FM, TV], separate ownership, of course, would bring more voices to the overlapping audiences. Such overlap may be substantial.”¹⁰ Thus, cross-ownership restrictions were necessary to ensure the “diversification of programming sources and viewpoints.”¹¹

In adopting the radio/television cross-ownership rule, the Commission also sought to foster “maximum competition” among and between media outlets.¹² As such, the degree of substitutability between radio and television for advertising purposes was a component of the Commission’s decision to limit cross-ownership. The Commission relied on a report by the Department of Justice, which stated that “AM, FM, and TV are for many purposes sufficiently interchangeable to be directly competitive, and that competitive considerations support adoption of the [radio/television cross-ownership] rules.”¹³ The Justice report further explained that “one effect of combined ownership of broadcast media in the same market is to lessen the degree of competition for advertising among the alternative media.”¹⁴ Thus, as a result of this high degree

⁷ *Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903 ¶ 19 (1999) (“1999 Order”).

⁸ *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard FM, and Television Broadcast Stations, Report and Order*, 22 FCC 2d 306, ¶¶ 16-17 (1970) (citing *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945)).

⁹ *Id.* ¶25.

¹⁰ *Id.* ¶44.

¹¹ *Id.* ¶3.

¹² *See id.*

¹³ *Id.* ¶25.

¹⁴ *Id.*

of substitutability, the Commission concluded that ownership restrictions were necessary to “prevent any undue concentration of economic power contrary to the public interest.”¹⁵

The radio/television cross-ownership rule remained largely unchanged for almost two decades. It was not until 1989 that the rule was relaxed considerably. In the *1989 Order*, the Commission explained that “[e]ven though the... adoption of the rule may have been based upon valid policy decisions in 1970, we must conclude that circumstances have changed substantially in the eighteen years since then... [T]oday there are many more outlets for information and viewpoints throughout all types of markets than there were in 1970.”¹⁶ In light of the proliferation of these “voices,” the Commission explained that “our diversity concerns have become somewhat attenuated... and thus may be outweighed by benefits that could be achieved by modifying the current rule.”¹⁷ With respect to economic competition, the Commission concluded that the “increased availability of media outlets has substantially reduced the risk that relaxing the radio-TV cross-ownership rule will significantly decrease the level of competition in local markets.”¹⁸ This decision was primarily founded on the belief that “unconcentrated markets” with a plentitude of firms will tend to be “quite competitive.”¹⁹ Thus, the Commission did not eliminate the rule; rather, the Commission relaxed it to the extent it felt justified by the increase in outlets and its understanding of the various entry barriers into the general broadcasting market.²⁰

In the *1999 Order*, the Commission again acknowledged the ultimate objectives underlying the cross-ownership rule: diversity and economic competition. And as it had done following the last major examination of the rule, the Commission loosened restrictions on radio/television cross-ownership. In doing so, the Commission indicated that “elimination of the rule might be warranted if we concluded that radio and television stations do not compete in the same local advertising, program delivery, or diversity markets.”²¹ The Commission concluded that “[t]he public continues to rely on both radio and television for news and information,

¹⁵ *Id.* ¶28 (citations omitted).

¹⁶ *Amendment of Section 73.3555 of the Commission’s Rules, the Broadcast Multiple Ownership Rules, Second Report and Order*, 4 FCC Rcd 1741, ¶24 (1989) (“*1989 Order*”).

¹⁷ *Id.* ¶21.

¹⁸ *Id.* ¶28.

¹⁹ *See id.* ¶26.

²⁰ Ultimately, the Commission concluded “that the prohibition against common ownership of radio and TV stations in the same market should be liberalized... We believe that this action reflects the substantial growth and availability of media outlets in local markets....” *Id.* ¶8.

²¹ *1999 Order* ¶104.

suggesting the two media both contribute to the ‘marketplace of ideas’ and compete in the same diversity market.”²² The Commission specifically found that as radio and television “do serve as substitutes at least to some degree for diversity purposes, we will retain a relaxed one-to-a-market rule to ensure that viewpoint diversity is adequately protected.”²³ With respect to economic competition, the Commission simply stated that “although radio and television stations may or may not compete in different advertising markets, we believe a radio-television cross-ownership rule continues to be necessary to promote a diversity of viewpoints in the broadcast media.”²⁴

Most recently, the Commission last month effectively replaced the radio/television and newspaper/TV cross-ownership rules with “media” cross-ownership rules intended to “protect viewpoint diversity by ensuring that no company, or group of companies, can control an inordinate share of media outlets in a local market.”²⁵ The Commission explained that for smaller markets (*e.g.*, markets with three or fewer TV stations), no cross-ownership is permitted. For markets with nine or more TV stations, the Commission determined that “neither the newspaper-broadcast prohibition nor the TV-radio cross-ownership prohibition could be justified...in light of the abundance of sources that citizens rely on for news.”²⁶ For markets with between four and eight TV stations, the Commission has set up three available options for media cross-ownership. With respect to competition, the Commission stated that the prior radio/television cross-ownership rule is not necessary “to promote competition because radio, TV, and newspapers generally compete in different economic markets.”²⁷

²² *Id.*

²³ 1999 Order ¶104.

²⁴ *Id.*

²⁵ FCC Sets Limits on Media Concentration, *News Release* at 7 (rel. June 2, 2003).

²⁶ *Id.*

²⁷ *Id.* Although the recently-adopted local broadcast ownership rules are in part premised on a finding that radio and television stations do not generally compete in an economic sense, that finding does not hold for Spanish-language broadcasting. Record evidence in this proceeding demonstrates that Spanish-language radio and television stations do in fact compete in advertising markets, and the radio/television Spanish-language broadcast market is characterized by high entry barriers that have prevented “general market operators” from entering. *See e.g.*, Letter from Philip L. Verveer, *et al.*, Counsel to Spanish Broadcasting System, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket 02-235 (June 23, 2003). At a minimum, this evidence strongly suggests that the Commission should re-open the matter for further comment in the context of the Biennial Review, consistent with demands from members of Congress and the public for a more complete airing of the FCC’s proposed factual findings and policy proposals.

Thus, although the FCC has decided to eliminate the radio/television cross-ownership rule adopted in 1970, it has retained limits on cross-ownership for “very thin” markets (markets with three or fewer TV stations) and “thin” markets (markets with 4 to 8 television stations) to ensure adequate diversity. Indeed, the FCC’s relaxation of the radio/television cross-ownership rule since 1970 can be understood as a response to more robust local markets as the number of TV and radio stations have increased over time. Critically, the FCC holds to this very day that radio and television are part of the same “market” for diversity purposes. It has simply determined that the number of radio and television outlets available in the general market, along with an understanding of the entry barriers to that market, justifies a very relaxed cross-ownership limit.

Application of the Radio/Television Cross-Ownership Rules to the Pending Transaction.

On June 18, 2003 the National Hispanic Policy Institute (“NHPI”) requested that the Applicants amend their application to demonstrate whether the proposed transaction complied with the Commission’s recently-adopted cross-ownership restrictions.²⁸ Its cursory review of the transaction led the NHPI to conclude that in at least two markets, Houston and San Antonio, a Univision-HBC combination would run afoul of the Commission’s general media ownership rules.²⁹

Although the FCC adopted its general media ownership rules in the broader context of English-language media, and those rules must be understood as merely heuristic devices (to aid the FCC in carrying out its public interest obligations), the principles and insights that underlie the general rule are also helpful tools for analyzing the Spanish-language media markets. In such an analysis, only Spanish-language broadcast stations would be counted when determining compliance with the rules.

Local Spanish-language broadcasting markets plainly warrant vigilant protection as “thin” markets. In fact, as shown in Attachment A, in five of the ten largest Hispanic markets, Spanish-language broadcasting would be considered a very thin market under the Commission’s recently-adopted cross-ownership rules (fewer than four TV stations licensed to the market), where cross-ownership would be strictly prohibited. As shown in Attachment B, Univision presently has TV duopolies in four of the remaining five thin markets, which would be prohibited by the new local TV ownership rule.³⁰

²⁸ Letter from Arthur V. Belendiuk, Counsel to National Hispanic Policy Institute, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket 02-235 (June 18, 2003).

²⁹ *Id.* at 2.

³⁰ The duopoly in Houston may be permissible under the new rule if one of the stations is outside the top four stations in the market by ratings. There are five Spanish-language TV stations in the market. However, the merged entity would be over the limit for local radio station ownership in Houston under the new rule (there are 13 total Spanish-

In fact, Attachment B demonstrates that the merger would often combine television duopolies with multiple radio stations, including as many as six in two markets (Houston and Dallas), not including Entravision. Accordingly, understanding the Spanish-language market as a separate market, and applying the Commission's media ownership regulations to such a market (which by-and-large omit any consideration of Univision's and HBC's very high market share), the proposed transaction cannot survive Commission scrutiny.

Moreover, even applying the Commission's "thin market" regulations to the Spanish-language broadcasting market is insufficient to protect diversity and competition, considering the extreme "thinness" and the significant entry barriers to the Spanish-language market.³¹ Indeed, as the Commission noted in *Spanish Radio Network*, its media ownership rules were "not geared toward such a market definition."³² The rules were designed to apply to the relatively robust general broadcast and media market, and in no way account for the unique characteristics of the Spanish-language market, which would require a more stringent rule. The Spanish-language markets of today are more fragile than the general markets of 1989, when the radio/television cross-ownership rule was first relaxed to allow for waivers of the rule in the top 25 markets. In 1989, the FCC relied on data indicating that in the top 25 television markets there were an average of 13.4 TV stations, 29.8 commercial AM stations and 29.2 commercial FM stations.³³ As shown in Attachment A, in the top ten Hispanic markets today there are an average of 3.3 television stations, 5.7 AM stations, and 6 FM stations. In terms of the number of broadcast stations in the market, the top ten Hispanic markets today more closely resemble markets 151-175 from 1989 (an average of 3.9 TV stations, 4.8 AM stations and 5 FM stations).³⁴ Yet, inherently relaxed as the new general market rules are, if applied to Spanish-language markets the new general market rules would preclude the proposed merger.

language stations in the market, which would allow the merged entity to own five, three in one class (AM or FM), but the merged entity will hold six, five of them FM).

³¹ The recently-adopted rules also are premised on a lack of economic competition between radio and television stations, which is emphatically not the case with respect to Spanish-language broadcasting. *See supra* note 28.

³² *Spanish Radio Network, Memorandum Opinion and Order*, 10 FCC Rcd 9954, ¶8 (1995). The fact that the media ownership rules historically have been "geared" for the general market and do not account for the unique characteristics of the Spanish-language markets is not a proper basis for continuing this oversight. This is particularly so in light of the substantial record evidence submitted by SBS in this proceeding demonstrating that Spanish-language broadcasting is a separate market for diversity and competition purposes and the fact that Hispanic Americans are now the single-largest U.S. minority at 38.8 million people, as determined by the U.S. Census Bureau.

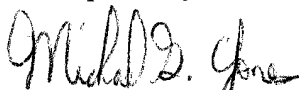
³³ *1989 Order* ¶14.

³⁴ *See 1989 Order* ¶14, n. 20.

Conclusion

The extreme thinness of the top ten Spanish-language broadcasting markets, combined with the high entry barriers that characterize such markets, makes clear that approval of this transaction is not in the public interest and therefore, the application cannot be granted pursuant to Sections 309 and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§309, 310. As a result of the merger, viewpoint diversity and competition would be intolerably curtailed. Certainly Spanish-speaking Americans are entitled to the same First Amendment and statutory right to the "widest dissemination of news and information from a multiplicity of antagonistic sources"³⁵ as English-speaking Americans. Indeed, the Commission acknowledged this in its decision released yesterday adopting new media ownership regulations, stating "[t]hose whose primary language is not English deserve the same protections of diversity and competition as do English speakers."³⁶ Approval of the proposed merger would be tantamount to denying them that right.

Respectfully submitted,



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³⁵ *Supra* note 7.

³⁶ 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *et seq.*, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, ¶458 (2003).

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cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Susan M. Eid
Stacy R. Robinson
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Catherine Crutcher Bohigian
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Robert Ratcliffe
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Scott R. Flick, Counsel for Univision Communications, Inc.
Roy R. Russo, Counsel for Hispanic Broadcasting Corp.
Harry F. Cole, Counsel for Elgin FM Limited Partnership
Arthur V. Belendiuk, Counsel for National Hispanic Policy Institute, Inc.

ATTACHMENT A

Spanish-Language Broadcast Radio and Television, 2002

Metropolitan Area	Spanish-Language FM Stations	Spanish-Language AM Stations	Spanish-Language Television Stations
Los Angeles	9	8	4
New York	3	4	2
Miami	6	10	4
Chicago	7	3	2
Houston	8	5	5
San Francisco/San Jose	3	5	4
Dallas/Ft. Worth	6	7	3
San Antonio	4	5	2
Phoenix	7	4	2
Brownsville/McAllen	7	6	5
Average for Top Ten	6	5.7	3.3

Notes: Station count includes stations for which BIA reports revenues. Based on a conversation with the Director of Research at BIA, it appears that BIA strives to report estimated revenues for all Arbitron-rated stations in the metropolitan area.

Sources: 2002 BIA, Inc.; various internet websites; 2002 *U.S. Hispanic Market*, Strategy Research Corporation.

ATTACHMENT B

Univision-HBC Combined Radio and Television Stations

Top 10 Hispanic Markets By Population

Metro Area	Merged Entity	Merged Entity	Merged Entity
	AM Stations	FM Stations	TV Stations
Los Angeles	1	3(5)	2
New York	1	1	1
Miami	2(3)	2	2
Chicago	2	2(4)	1
Houston	1	5	2
San Francisco	(1)	2(3)	2
Dallas/Ft. Worth	2(3)	4(6)	2
San Antonio	1	3	1
Phoenix	0	4(7)	1
Brownsville-McAllen	1	1(3)	(1)

Notes:

Station count includes stations for which BIA reports revenues. Based on a conversation with the Director of Research at BIA, it appears that BIA strives to report estimated revenues for all Arbitron-rated stations in the metropolitan area. The merged entity total including Entravision stations shown in parenthesis. Pursuant to a consent decree with the Department of Justice, Univision has six years to reduce its ownership interest in Entravision from approximately 30% to 10%.

Sources:

2002 BIA, Inc.; various internet websites; 2002 U.S. Hispanic Market, Strategy Research Corporation; Entravision 10-K 2002.